CHAPTER 10
TOWARDS AN EVER CLEARER DIVISION OF AUTHORITY BETWEEN THE EUROPEAN UNION AND THE MEMBER STATES?

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1. INTRODUCTION

Fuelled by fears of 'creeping competences', the distribution of powers between the European Union and the Member States has already been a hotly debated issue for decades. The European Council Declaration of Laeken prescribed 'a better division and definition of competence in the European Union' as one of the main tasks of the European Convention on the Future of the European Union. The work of the Convention has been partly included in the Treaty of Lisbon. It has introduced a number of elements which either protect Member States' interests and/or create greater clarity with regard to the distribution of competences between the European Union and the Member States. These new elements include the new principle of respect for national identities (Article 4(2) TEU), the Protocol on the Principles of Subsidiarity and Proportionality (which entailed a strengthening of both the subsidiarity principle and the powers of national Parliaments) and the set of guarantees in the decision-making process in the field of judicial cooperation in criminal affairs (e.g. the suspension of the legislative process if a Member State considers that fundamental aspects of its criminal justice system are at stake – Article 82(3) TFEU).[1] More generally, the Treaty of Lisbon mirrors a greater sensitivity to the issue of the division of power between the EU and the Member States. A number of legal bases for the European Union to act have been defined in a clearer fashion and their exercise has been subjected to stricter conditions.[2]

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1 These new elements in the Treaty of Lisbon have been received with ambiguity: some scholars mark the Treaty as a step forward, but not as an overall success: e.g. T. KONSTADINIDES, *Division of Powers In European Union Law: the delimitation of internal competence between the EU and the Member State*s, Kluwer Law International, Alphen aan den Rijn 2009, p. 232.

2 See e.g. the procedural guarantees attached to the use of Article 352 TFEU (the 'Flexibility clause') and the further limitations that flow from Declarations 41 and 42 attached to the treaties. Other legal bases, most notably in the area of criminal cooperation, have been reduced in scope.

The common legal concept to analyze the relation between the European Union and the Member States is that of 'competences' or 'powers'. As the European Union possesses no originary competences, the principle of conferral (Article 5 TEU) constitutes the basis for the identification of all of the European Union's competences as well as of the national origin of these competences. Next, the analysis of the concrete competences elaborated in the TFEU, the classification of these competences (Arts 2-6 TFEU) and the principles governing the exercise of these competences (most notably the subsidiarity and proportionality principles) are key issues.

The central notion of this contribution – authority – is broader than that of powers or competences. Authority is one of the three building blocks of the concept of national sovereignty in international law theories. The aim of this contribution is to show how authority in the EU legal order is distributed between the national and European levels and how that is determined by substantive and institutional core values.[3] It seeks to evaluate how the European Union actually exercises legislative (and to some extent also: enforcement) authority and how this is determined by institutional principles, rather than to evaluate the nature and the scope of the formal power distribution between the European Union and the Member States. The focus is thus not so much on the *a priori* existence of competences but rather on the *ex post* analysis of the way in which these competences are actually applied. As such, this approach serves to provide part of the answer to the overall question of this volume: how sovereignty is shaped in the EU/national legal order?

This chapter proceeds as follows. I will first define the notion of authority (Section 2) and argue how it serves the purposes of our analysis. Following that, I will analyze the extent to which the 'classic' principles of conferral, subsidiarity and proportionality determine the actual division of norm-setting and enforcement authority (Section 3). Then I will examine and classify national discretion in EU law (Section 4). Whereas in Section 3 a deductive and top-down perspective will be applied (from the general principles down to the actual legislative practice), in Section 4 an inductive and bottom-up approach is taken to reason how the actual legislative practice affects the division of authority between the EU and the Member States. The policy studies from the earlier chapters inform both Section 3 (to what extent the institutional principle affects the division of authority) and Section 4 (what types and degrees of national discretion are found in EU law). In Section 4 a typology of different forms of national discretion will be developed.

It will be argued that not only institutional principles define the division of authority, but substantive core values as well. Moreover, the level and type of national discretion constitutes another important factor that defines the division of authority between the EU and the Member States.

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3 The role of the EU's Charter on fundamental rights as a source of authority and as a limit thereon is discussed in the contribution by Van Eijken, Emaus, Luchtman and Widdershoven in this volume, Chapter 11, and will therefore not be further addressed in this chapter.

2. DEFINING AUTHORITY

For the purposes of this contribution, *authority* relates to the actual adoption of norm-setting and enforcement legal acts at the European and national levels of government.[4]

The term authority is also used in disciplines other than law, such as political sciences and public administration, to denote the position of one party to exercise power which would be perceived as legitimate by the party subjected to that exercise of power.[5] The above definition is more specific as it is based on the legal framework and legal sources. In line with the common definition employed in public administration studies, though, it is defined as a descriptive concept. This avoids the strong normative connotation that is connected to the concepts of powers, conferral and the like. A legal-systematic approach, based on the Treaties and constitutional principles of EU law will be combined with a bottom-up approach, that draws on a comparative analysis of how authority is exercised in the various legal domains that have been studied in the preceding chapters.

Authority defined in this way remains a multifaceted concept. Therefore, a distinction will be made between norm-setting authority and enforcement authority. The former concept refers to the adoption of legislative norms as well as to executive rule making (in the sense of the adoption of generally applicable and legally binding rules). Enforcement authority refers to acts of supervision, coordination and enforcement to ensure the actual effectuation of legal norms in practice. This distinction is particularly relevant in light of the classic approach in

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4 This means that this contribution will be limited to the vertical relation between the EU and the Member States. The horizontal dimension (the relation among the Member States, e.g. via networks of public authorities) will thus not be addressed, nor will the role of private actors in norm setting and enforcement activities receive attention.

5 Most notably, Max Weber conceptualized authority as the power to command and the duty to obey on the basis of a certain minimum of voluntary submission. BLAU derived the following definition of Weberian authority: '*we speak of authority … if the willing unconditional compliance of a group of people rests upon their shared beliefs that it is legitimate for their superior (person or impersonal agency) to impose his will upon them and that it is illegitimate for them to refuse obedience*'. Weber then distinguished between traditional, charismatic and legal authority. *Traditional* authority refers to authority derived from the present social order and cultural beliefs, an example being hereditary rule. *Charismati*c authority derives from the inspiring and convincing qualities of the leader. Finally, *legal* authority refers to the belief in the supremacy of the law. Alternatively, Herbert Simon has proposed that '*an individual accepts authority when his choice among alternative behaviors is determined by the communicated decision of another*'. This definition is similar to Weber's conceptualization in that it also (albeit implicitly) emphasizes the voluntary nature of the acceptance of power, which results from a belief in the legitimacy of that power from a communicated decision. M. WEBER, *Economy and Society*, G. Roth, C. Wittich (eds.), University of California Press Berkeley, Los Angeles, London 1978, pp. 215-245. For an interpretation of the Weberian idea of authority and Simon's definition of the concept, see e.g.: P.M. BLAU, 'Critical Remarks on Weber's Theory of Authority' (1963) 57:2 *The American Political Science Review*, pp. 305-316 and H. SIMON, 'Notes on the Observation and Measurement of Political Power' (1953) 15:4 *Journal of Politics* 1953, pp. 500-516.

which the EU sets substantive norms but leaves it to the Member States to adopt the appropriate measures to implement them.

3. THE CLASSIC APPROACH TO AUTHORITY: INSTITUTIONAL PRINCIPLES SHAPING THE RELATION BETWEEN THE EU AND THE MEMBER STATES

3.1. INTRODUCTION

The distribution of authority between the EU and the Member States is determined first of all by the institutional principles which are now listed in Article 5 TEU. The principle of conferred powers has been at the basis of the distribution of power between the EU and its Member States since the inception of the EEC. The principles of subsidiarity and proportionality have been guiding the *exercise* of the Union's competences since the Treaty of Maastricht. These principles are not static: Treaty reforms and Treaty amendments since the Treaty of Rome have resulted in an ever expanding list of legal bases for EU action. Some of these legal bases have, however, been made subject to more specific rules on their substantive scope and on conditions which apply to their use. Treaty amendments have equally changed the procedural (and, indirectly, also the substantive) legal framework for the application of the subsidiarity principle. In the remainder of this section, we will analyze the effects of these principles on the distribution of authority between the EU and the Member States.

3.2. PRINCIPLE OF CONFERRED POWERS

The principle of conferred powers (Article 5 TFEU) is the starting point for the exercise of the EU's competences. The principle is elaborated in the basic treaties and results in a lengthy list of concrete EU competences. The Treaty of Lisbon is of particular importance here. It created an explicit 'catalogue of competences' (Articles 2-6 TFEU) and classified most EU powers into three categories. Furthermore, the Treaty of Lisbon includes a Declaration (no. 18) which provides that residual powers remain at Member State level. The Treaty has not however solved (or even addressed) a number of other issues that have arisen in the past decades:

- the lack of satisfactory arrangements in case of overlapping or conflicting competences;[6]
- the weak judicial monitoring of the correct use of legal bases as a result of the Tobacco Advertisement judgment of the CJEU, most notably by allowing the EU legislature to use legislative competences to pursue other objectives than those for which they were designed;[7]
- the weak substantive delineation of various competences, most notably the two 'horizontal' competences: Articles 114 TFEU and 352 TFEU;[8]
- the system of power attribution is designed for legislative powers and less for executive and judicial powers;[9]
- even though the Member States have explicitly attributed powers to the EU by amending the basic treaties to that end time and again, there is a sense that the process of acquiring and exercising powers is somehow unclear, uncontrolled and not justified ('creeping competences');[10]
- the existing view that the interests and/or the powers of the Member States are ill-protected in the EU's constitutional system.

This is not the place to analyze these legal as well as political and social issues in detail, but it is obvious that they affect how authority is distributed in the EU. The concerns over 'creeping competences' have, for instance, led the EU legislature to be more cautious in proposing new EU legislation and to better argue the necessity thereof.

The system of EU competences based on the principle of conferral is elaborated in an intricate system of Treaty competences and the actual application thereof by the EU legislature. The first element will be labelled the 'Treaty dimension' as it is determined by the Treaties, whereas the latter aspect will be labelled the 'legislative' dimension. The Treaty dimension refers to the legality issue: what is the content, the scope and what are the limits of the powers conferred by way of the Treaties on the European Union? The second dimension refers to legislative *policy*. The

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6 P. CRAIG 'Competence: clarity, containment and consideration' (2004) 29 *European Law Review*, pp. 323-344. Craig discusses this problem in relation to types of powers (e.g. an overlap between a shared and a supporting competence) which creates obvious problems, but issues may equally arise in case of an overlap of powers that belong to the same type.

7 S. WEATHERILL, 'The Limits of Legislative Harmonization Ten Years after Tobacco Advertising: How the Court's Case Law has become a "Drafting Guide"' (2011) 12:3 *German Law Journal*, pp. 827-864 and A. VAN DEN BRINK, 'De begrenzing van de bevoegdheden van de Europese Unie als een gedeelde constitutionele opdracht' (2014) 6 *SEW Tijdschrift voor Europees en Economisch recht*, pp. 266-275. The EU legislature actively uses the possibility to adopt internal market measures even if other considerations are decisive: see e.g. consideration 2 of the Patients' rights Directive 2011/24/EU of 9 March 2011 on the application of patients' rights in cross-border healthcare [2011] L88/45.

8 *Ibid*.

9 In this respect, see F.C. MAYER, 'Competences-reloaded? The vertical division of powers in the EU and the new European constitution' (2005) 3:2/3 *International Journal of Constitutional Law*, pp. 493-515.

10 CRAIG, *supra* at 7.

question here is how the principle of conferral determines what measures the EU actually adopts (and why, for instance. legislation is adopted in one area but not in another). This relates to issues such as: how are legal bases justified; what legal basis is chosen in case of multiple options; is the choice of the appropriate legal basis a crucial factor to determine whether the EU should act at all and if so, how? And what are the differences between areas? In contrast with the first dimension, the dimension of legislative choice has received little attention in legal doctrine, perhaps because judicial control of the CJEU mainly focuses on the first dimension.[11] Yet, it is a crucial factor for the actual division of authority between the EU and the Member States.

The 'Treaty dimension'

The objectives and the scope of legal bases are key elements in order to assess the legality of the legal basis. The case of the Commission's proposal to promote an equal representation of men and women on corporate boards is a case in point. The Commission had opted to base its proposal on the general Internal market provision which is Article 114 TFEU, whereas Article 157 § 3 TFEU (equal pay for male and female employees) would have seemed a more appropriate option. The issue was hotly debated, and the controversy mainly focused on the main objective or rationale of this legislation: whether the economic or the justice rationale prevailed.[12] In light of the Tobacco Advertisement Directive doctrine, this is an interesting finding, as the CJEU in this case has downplayed the relevance of the objective for the choice of the correct legal basis. But also the *scope* of the two legal bases proved to be an issue in its own right. It was questioned whether Article 157 TFEU allows for positive action measures such as the proposal in question and whether membership of corporate boards qualifies as a matter of employment and/or employment.

The various codification efforts have equally come across legality issues. The initiative to develop a Common European Sales Law could not be based on a specific legal basis with that objective and thus a choice between Articles 114 TFEU and 352 TFEU had to be made. The proposal was based on Article 114 TFEU. It has been questioned whether that choice was correct given the fact that the proposal *strictu sensu* seeks no harmonization of national contract laws, but

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11 An exception may be the current discussion in EU criminal law of the question in which areas the EU may impose criminal sanctioning on the Member States on the basis of Article 83(2) TFEU, see among many others, J.A.E. VERVAELE, 'The European Union and harmonization of the Criminal law enforcement of Union policies: in search of a criminal law policy?' in M. ULVÄNG and I. CAMERON (eds.), *Essays on criminalization & sanctions*, Iustus förlag, Uppsala 2014; P. ASP, *The Substantive Criminal Law Competence of the EU. Towards an Area of Freedom, Security and Justice*, Part I, Skrifter utgivna av Stockholms Universitet, Stockholm 2012; N. JAREBORG, 'Criminalization as Last Resort (Ultima Ratio)' (2004) *Ohio State Journal of Criminal Law*, pp. 521-534; M.S. GROENHUIJSEN and J.W. OUWERKERK, 'Ultima ratio en criteria voor strafbaarstelling in Europees perspectief' in M.S. GROENHUIJSEN, T. KOOIJMANS and J.W. OUWERKERK (eds.), *Roosachtig strafrecht*, Kluwer, Deventer 2013, pp. 249-280.

12 See the contribution by BUIJZE, DE KONING and SENDEN, Chapter 3 of this volume.

merely introduces a separate and second regime of contract law within the national laws, which is optional for contracting parties.[13] The current initiative to set up a Common European Administrative Law is perhaps even more problematic, both in terms of the objective of the proposed law and the scope of the possible legal basis. The link with the proper functioning of the Internal Market is difficult to make. Therefore, it has been proposed to base it on Article 297 TFEU which lays down that the EU institutions shall be supported by an 'open, efficient and independent European administration' and that legislative acts shall be adopted to that end.[14] As the proposal would apply to national administrations, Article 297 TFEU seems to be an inappropriate legal basis.

The case of EU economic governance shows that not only the *scope* and the *objectives*, but also the very *nature* of EU competences may be unclear. As a 'special competence', the coordination of economic policies has remained outside the catalogue of competences (along with *inter alia* the Common Foreign and Security Policy). Article 5 TFEU only reveals that the Council may adopt 'broad guidelines' to that end and that 'specific provisions' shall apply to the Member States of the Eurozone. These formulations reveal little about the actual nature of these competences. Title VIII reveals more on their nature. Especially the strengthening of the so-called preventive arm of economic policies may be seen as problematic, as Article 122 TFEU prescribed that these policies should be based on *guidelines* (more particularly Broad Economic Policy Guidelines – hereafter: BEPGs). This seems at odds with the current legal framework as it has been developed by EU secondary law. This legal framework includes the power for the EU institutions to adopt binding measures and, ultimately, to impose sanctions.

Mayer has argued that the Treaty of Lisbon reflects a greater sensitivity to competence issues.[15] This argument is mainly based on an analysis of the Treaties (most notably the catalogue of competences and the subsidiarity monitoring system). But a greater sensitivity to competences may equally be observed with respect to concrete Treaty powers. Various competences have been further elaborated, such as the flexibility clause (Article 352 TFEU) and a number of criminal law legal bases. And – as we will see in the next section – the choice of an appropriate legal basis (and the justification of EU action in that light) receives more attention in legislative procedures nowadays, at least in the newer areas of EU activity.

The 'legislative dimension'

The next step is to evaluate how Treaty competences are actually applied. Indeed, the Treaty system of competences only reveals, to a limited extent, how authority is

13 See the contribution by BUIJZE, KRUISINGA and KEIRSE, Chapter 7 of this volume.

14 See the Model Rules on EU Administrative Procedure that have been developed by the Research Network on EU Administrative Law (ReNEUAL), available at: <www.reneual.eu>.

15 F.C. MAYER, 'Competences-reloaded? The vertical Division of Powers in the EU and the new European Constitution' (2005) 3:2/3 *International Journal of Constitutional Law* 2005, pp. 493-515.

exercised, based on these Treaty competences and the scope thereof. The adoption of EU legislation indeed reveals totally diverging situations between policy areas that all fall within the group of shared competences (the most common category of Treaty competences).[16] The legislative practice is therefore a key element in understanding the relationship between the EU and the Member States.

One might assume that the legal basis would be crucial for the decision on whether to act at the EU level and for the decision on how to actually shape EU legislation. Arguments may indeed be derived from the EU's legislative practice to support this. Well-known examples include the introduction – in the Single European Act – of what is now Article 114 TFEU and which sparked an impressive expansion of Internal market legislation in the early 1990s. Similarly, the growth of legislative acts in the areas of EU immigration law (after the entry into force of the Treaty of Amsterdam) and criminal law (after the entry into force of the Treaty of Lisbon) have been a direct consequence of the introduction of more flexible legal bases in these respective areas.

The legal basis regularly emerges as an issue which concerns the question of whether an appropriate legal basis exists for the EU to act. A good example is the proposal for the so-called 'Monti II' Regulation regarding the right to strike.[17] National parliaments have been extremely critical of the use of Article 352 TFEU as a legal basis, especially in light of Article 153(5) TFEU which explicitly excludes the right to strike from the Title on social policy.[18] As a consequence of this fierce critique, the Commission decided to withdraw the proposal. More in general, national parliaments regularly include legal basis arguments in reasoned opinions on EU legislative proposals.[19] The codification initiatives in the law of administrative procedure and contract law have equally met substantial legal basis issues.[20]

A particular source of legal basis conflicts concerns Article 114 TFEU, the general internal market harmonization legal basis. An analysis by Weatherill indicates that the application of this legal basis is still regularly contested, even

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16 Craig, *supra* at 7, p. 83.

17 Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services, COM(2012)130 final.

18 F. FABBRINI and K. GRANAT, 'Yellow Card, but No Foul: The role of National Parliaments under the Subsidiarity Protocol and the Commission Proposal for an EU Regulation on the Right to Strike' (2013) 50:1 *Common Market Law Review* 2013, pp. 115-143. These authors are critical of the role of national parliaments not only as the legal basis issue falls outside the scope of subsidiarity control, but also because they consider the Treaties to establish a sufficient legal basis for the proposal in question. Indeed, they argue that the Commission should have changed the content of its proposal (by striking a different balance between the social and economic interests) rather than withdrawing it altogether (p. 141).

19 A. VAN DEN BRINK, 'The Substance of Subsidiarity: the Interpretation and Meaning of the Principle after Lisbon' in M. TRYBUS and L. RUBINI (eds.), *The Treaty of Lisbon and the Future of European Law and Policy*, Edward Elgar, Cheltenham 2012, pp. 163-170.

20 See the contribution by BUIJZE, KRUISINGA and KEIRSE, *supra* at 14, Sections 3.2 and 3.3.

though the CJEU has imposed quite flexible limitations on its use.[21] Since the first Tobacco Advertisement Directive, the CJEU has never again annulled legislation on the ground that Article 114 TFEU would be an inappropriate or insufficient legal basis. Yet, this has not prevented various actors from regularly bringing cases before the CJEU. All these court cases have involved EU legislation which pursued other public interests than the better functioning of the Internal market. Arguably, this constitutes the real issue with regard to Article 114 TFEU, and not so much its general scope of application.

The legal basis issue is not however limited to vertical power conflicts (the situation in which an EU power conflicts with a national one). Also in case of concurring EU competences the legal basis may be a relevant factor in the legislative procedure. It is true that – now that the ordinary legislative procedure applies to the vast majority of policy areas – the differences in procedural consequences of the choice of legal basis have diminished. Still, the choice of the legal basis determines the content and scope of EU legislation. The proposal on the equal representation of men and women on corporate boards is a case in point here. Although the proposal has been based on Article 157(3) TFEU (male/female equality), the justification for the directive is mainly driven by internal market concerns.[22] In reaction to this framing of the proposal, national governments and parliaments have criticized the proposal on grounds that it sits badly with the proposed objectives.[23] It has been argued that the Commission should have better aligned the choice for the legal basis, the objectives of the proposed directive and the content thereof.[24] Although the outcome of this legislative procedure is still uncertain, the legal basis is certainly a decisive factor here.

The legal basis is often, however, much less of a decisive factor in legislative procedures. This is even so with respect to legislation adopted under Article 114 TFEU. Having offered the EU legislature a great deal of political flexibility, it has become the basis of a wide variety of legislation ranging from intellectual property rights law,[25] consumer protection,[26] the Biocides Regulation[27] to environmental

21 S. Weatherill, *supra* at 8, pp. 831-834.

22 See the contribution by BUIJZE, DE KONING and SENDEN, *supra* at 13.

23 *Ibid*., Section 3.3.

24 *Ibid*., Section 3.3

25 E.g. Directive 2011/77/EU of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights [2011] OJ L265/1.

26 E.g. Regulation (EC) No. 2006/2004 of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation) [2004] OJ L364/1.

27 Regulation 528/2012/EU of 22 May 2012 concerning the making available on the market and use of biocidal products [2012] OJ L167/1.

standards for tractors[28] and patients' rights.[29] Even though such legislation pursues additional objectives over the good functioning of the Internal market, the choice of the appropriate legal basis has been of limited relevance in the respective legislative procedures.[30] This suggests a confirmation of the observation made above that the real issue with regard to Article 114 TFEU is limited to the situation in which the *prime* objective of EU legislation is not the good functioning of the internal market. Still, the inclusion of other policy objectives in legislation in which the internal market is an important foundation weakens the link between the principle of conferral and the actual legislation that is adopted. Such a weak link may be witnessed in other fields as well. The developments in financial regulation and competition law have been highly dynamic in recent years, resulting in regulatory systems that fundamentally differ from their predecessors. The changes in competition law must be explained from the different weight that is now attached to the core values of consumer welfare, market stability and economic efficiency. This has resulted in a different trade-off between these values which shapes the current legislative system. The legal bases for adopting competition law measures have played no significant role in this process. Similarly, the inclusion of social concerns in EU public procurement law has been the result of a fundamental rebalancing of core values in that field. The legal bases of this new legislation have neither been the driver nor the facilitator of these changes.[31] Social rights have equally come to shape Internal Market legislation – and the Free movement of Persons and Services Law in particular – much more than before (partly as a result of the binding nature of the EU Charter on Fundamental rights) without this being determined by the legal bases of this legislation.[32]

Financial regulation has undergone changes of an even more fundamental nature in recent years. These have primarily been a reaction to the economic crisis. The legal basis has not been an issue of great importance here. Admittedly, the legal basis has played a role with regard to some specific elements of financial regulation, e.g. with regard to the supervisory powers of the European Central Bank. But, in general, it has proven to be self-evident to ground the various measures on the Internal market legal basis. Indeed, the implications of financial regulation for the functioning of the free movement of services and capital have not been difficult to identify. Also here, a 'rebalancing' of the underlying core values has been crucial to the redesign of the legislative system. Greater weight has been attached to healthy

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28 Directive 2011/72/EU of 14 September 2011 amending Directive 2000/25/EC as regards the provisions for tractors placed on the market under the flexibility scheme [2011] OJ L246/1.

29 Directive 2011/24/EU, *supra* at 8, the European Parliament and the Council have added Article 168 TFEU as an additional legal basis for this directive; the Commission had limited its proposal to Article 114 TFEU: W. SAUTER, 'Harmonisation in healthcare: the EU patients' rights Directive' (2011) 30 *Tilec Research Papers*.

30 To the extent that the question whether the EU should actually regulate has been an issue at all, this has been more of a political issue rather than an issue related to the choice of the legal basis.

31 See the contribution by PENNINGS and MANUNZA, Chapter 8 of this volume.

32 See the contribution by VELDMAN and DE VRIES, Chapter 4 of this volume.

banking institutions and the stability of the financial system and less so to ensuring free competition and freedom of enterprise.[33]

A parallel development may be witnessed in the area of economic policy coordination. New measures have been adopted as a direct reaction to the economic crisis here as well, such as the creation of the European semester as the procedural framework for shaping and coordinating economic policies, the development of more effective enforcement mechanisms and the creation of a new and separate regime to monitor and address macroeconomic imbalances (the 'preventive arm' of economic policy coordination).[34] Again, the legal basis issue has hardly been a relevant consideration here, even though it may be questioned how the Treaty system of monitoring on the basis of BEPGs relates to the secondary law system that is now in force.

3.3. SUBSIDIARITY

Subsidiarity has developed into a key principle regulating the exercise of powers between the European Union and its Member States. The way in which this has taken place is, however, less straightforward and more intricate than might be expected, as will be argued in this section. Following its formal introduction by the Treaty of Maastricht, it has gained special importance in the EU's institutional system with the entry into force of the Treaty of Lisbon in 2009. Key elements of the current Subsidiarity and Proportionality Protocol are:

- the legally binding nature of the principle for all EU institutions and for all of their acts (Article 1);
- the system of monitoring the application of subsidiarity by national parliaments (Articles 4-7) known as the Early Warning Mechanism;
- the review by the CJEU of legislative acts' compliance with the principle of subsidiarity (Article 8).

Furthermore, Declaration 18 attached to the Treaty of Lisbon explicitly calls for the EU legislature to repeal legislative acts if this would be in line with the subsidiarity and proportionality principles.[35]

The subsidiarity principle in general and the system of national parliaments' scrutiny thereof has received much critical scholarly attention. This critique includes

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33 See the contribution by van Bockel and Duijkersloot, Chapter 5 of this volume.

34 Although with regard to the latter, the issue may be raised how this stricter regime relates to the more flexible regime of the Broad Economic Policy Guidelines (BEPGs) that are entrenched in the TFEU.

35 The post-Lisbon practice has shown that the Commission has actively taken up this responsibility: in the period 2006-2014 the Commission has withdrawn 293 of its own legislative proposals, see: <http://ec.europa.eu/smart-regulation/refit/index_en.htm>.

fundamental points of concern such as the inappropriateness of subsidiarity to protect Member States' interests[36] or to help to alleviate the democratic deficit of the European Union.[37] Some have even argued that the principle poses a threat to European integration.[38] Equally, the defensive nature of the principle and the system of national parliaments' scrutiny has been criticized, and practical concerns have been raised, such as the necessity for national parliaments to cooperate.[39] After the introduction of the Early Warning Mechanism, it has been observed that national parliaments regularly base scrutiny on issues or concerns which have little to do with the actual subsidiarity principle.[40] Both the Commission[41] and scholars[42] have viewed this as an abuse of the Early Warning Mechanism.

In any case, these analyses indicate that subsidiarity has indeed become a key constitutional principle, but reveal little as to how subsidiarity actually impacts the distribution of authority between the EU and the Member States. Craig has argued that 'the desire to foster subsidiarity' has led to regulatory failure in areas such as energy, telecommunications and financial services regulation, the effects thereof being that the level of European Union regulation needed to be intensified.[43] With regard to financial services, however, one may argue that the liberal agenda that dominated the political discourse in the 1980s and 1990s, favouring a high measure of entrepreneurial freedom for financial institutions and organizations, provides for a better explanation for the defective regulatory framework. The change in the regulatory framework from 2008 onwards has been the result of the realization that financial market activity generates externalities which are not easily capable of being addressed by private sector actors.[44]

In general, however, arguments in favour of EU action are usually not hard to find. Moreover, private individuals usually have an explicit preference for EU

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36 G. DAVIES, 'Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time' (2006) 42:1 *Common Market Law Review* 2006, pp. 63-84.

37 P. DE WILDE, 'Why the Early Warning Mechanism does not Alleviate the Democratic Deficit' (2012) 6 OPAL Online Paper, available at: <www.opal-europe.org>.

38 See e.g. ESTELLA who observes that subsidiarity 'includes a very particular view of integration which is detrimental to the search for solutions which combine integration and diversity', A. ESTRELLA, *The EU Principle of Subsidiarity and Its Critique*, Oxford University Press, Oxford 2002, p. 7.

39 A. CYGAN, 'Collective' Subsidiarity Monitoring by National Parliaments after Lisbon – The Operation of the Early Warning Mechanism in Lisbon' in M. TRYBUS and L. RUBINI (eds.), *The Treaty of Lisbon and the Future of European Law and Policy*, Edward Elgar, Cheltenham 2012, pp. 55-73.

40 A. VAN DEN BRINK, 'The Substance of Subsidiarity: the interpretation and meaning of the principle after Lisbon' in: M. TRYBUS and L. RUBINI (eds.), *The Treaty of Lisbon and the Future of European Law and Policy*, Edward Elgar, Cheltenham 2012, pp. 160-177.

41 See the reaction of the Commission on the rejection of the European public prosecutor's office: COM(2013) 851 fin.

42 See FABBRINI and GRANAT, *supra* at 19, pp. 115-143.

43 P. CRAIG, 'Subsidiarity: a Political and Legal Analysis' (2012) 50 *JCMS*, p. 75.

44 VAN BOCKEL and DUIJKERSLOOT, *supra* at 34.

action.[45] The subsidiarity principle is thus a two-edged sword:[46] it may favour EU action to correct regulatory failures and/or to do justice to the legitimate interests of private individuals. But it may also support decisions to leave policy discretion to the Member States or to refrain from EU legislation altogether.

Despite all these points of critique and concern, the application of subsidiarity by the EU legislative institutions and national parliaments has greatly intensified in the post-Lisbon years.[47] The most tangible effect of subsidiarity on the relation between the EU and the Member States would be when national parliaments actually get the Commission to withdraw legislative proposals. In the last five years after the entry into force of the Lisbon Treaty we have witnessed only two examples of the Commission actually withdrawing its proposal.[48] This effect thus seems to be quite limited.

A perhaps more profound development concerns the embedding of subsidiarity in the Impact Assessment policy (and thus as part of the wider Smart Regulation policy) of the European Commission. The subsidiarity issue must be separately addressed in the case of an Impact Assessment on the basis of the following indicators:[49]

- does the proposal deal with *transnational aspects* that cannot be dealt with satisfactorily by individual Member State action;
- would action by the Member States acting alone, or the lack of EU action, significantly damage the *interests of Member States*;
- would EU action be preferable to Member State action given the *scale of the problem*;
- would EU action produce clear benefits as compared to Member State action judged in terms of *effectiveness*?

All of these indicators seem to favour EU action,[50] and thus suggest support for Davies' point that subsidiarity is ill-suited to balance EU and national interests integrally. However, the legislative practice indeed suggests a greater level of restraint on the part of the EU legislature. In particular the legislative policies

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45 CRAIG, *supra* at 43, p. 79.

46 R. DEHOUSSE, *The European Court of Justice: the Politics of Judicial Integration*, Macmillan, Basingstoke, Hampshire 1998, p. 161.

47 An indicator thereof is the increase in Reasoned Opinions by national parliaments from 70 in 2012 to 88 reasoned opinions in 2013: European Commission, Annual Report 2013 on Subsidiarity and Proportionality, COM (2014) 506 final, at p. 4.

48 The so-called Monti II Regulation and the Regulation establishing a European Prosecutor's Office. With regard to the latter proposal, the Commission has announced that it will pursue this initiative under the enhanced cooperation regime.

49 European Commission, Impact Assessment Guidelines 2009, SEC(2009) 92, p. 23.

50 The second indicator must, according to the Commission, be interpreted to mean national interests *under the Treaties* as the example of the restriction of the free movement of goods suggests. Thus, this indicator would –just as the others – point towards EU action rather than at national measures.

of the European Commission reflect a greater caution in adopting legislation.[51] The justification for EU legislation on the basis of as much 'qualitative and quantitative' data as possible has become increasingly important. The European Commission's Impact Assessment Board is particularly relevant here. It regularly points at the insufficient and poor argumentation of legislative proposals with regard to subsidiarity.[52] The justification based on qualitative and quantitative data is an element that equally determines the political dialogue between national parliaments and the Commission.[53] Yet, an actual change of the content of proposals as a reaction to national parliaments' concerns, remains rare.

We may conclude here that a greater subsidiarity 'sensitiveness' has certainly developed over the past years (by analogy to Mayer's observation that the Treaty of Lisbon has marked a greater 'competences sensitivity'). The impact thereof, however, is manifested mainly in the type and quality of the information provided to argue the necessity for EU action. Effects on the actual content of EU legislation are much more limited.[54]

Furthermore, the relevance of subsidiarity in the national/EU legal order is more ambiguous than may perhaps be expected. This is the result of two – somewhat contrasting – developments that may be distilled from the other contributions in this volume.

The first development concerns the relation between the treaty-based content of subsidiarity and its procedural framework of application. The procedural framework of subsidiarity monitoring (the Early Warning Mechanism and the Political Dialogue) has empowered national parliaments to influence the legislative process at the EU level. The formal limitations of their competences are, however, not accepted just like that. This results in the subsidiarity dialogue to encompass issues and arguments which have little to do with the actual – substantive – subsidiarity principle. Indeed, national parliaments evaluate legal basis issues and put forward proportionality and political expediency arguments.[55] Such arguments are in some cases 'disguised' as subsidiarity arguments. The proposal on the gender balance on corporate boards is a case in point here. A significant number of parliaments had issued reasoned opinions and the European Commission paid extensive attention to the justification of the proposal from subsidiarity grounds. Substantively, however, the subsidiarity arguments in favour of the proposal were quite strong.[56] Thus, it seems that the

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51 See e.g. Communication from the Commission, Work Programme 2015, COM(2014) 910 final.

52 The Annual Report on 2014 points at the Proposal for a Directive of the European Parliament and of the Council on provisional legal aid for suspects or accused persons deprived of their liberty and legal aid in European arrest warrant proceedings COM(2013) 824 final; and the Proposal for a Council Directive amending Directive 2006/112/EC on the common system of value added tax as regards the rules on invoicing, COM (2009) 21. In both instances the comments of the IAB have led to a better argumentation rather than to an amendment of the proposals at issue.

53 VAN DEN BRINK, *supra* at 40.

54 Although the Commission responds to Reasoned Opinions by referring to the level and type of national discretion entailed in their proposals.

55 VAN DEN BRINK, *supra* at 40.

56 See the contribution by BUIJZE, DE KONING and SENDEN, *supra* at 13, Section 3.3.

significance of subsidiarity was more *procedural* than *substantive* in nature: the weight of the parliamentary concerns could be increased by framing them in terms of subsidiarity considerations. As De Koning, Senden and Buijze argue, the substantive concerns were primarily related to the political (in)desirability of the proposal rather than to the question of the appropriate level of regulation. Subsidiarity is then simply a vehicle to voice other concerns.

This first development may suggest that the procedural context of subsidiarity monitoring may outweigh the substantive meaning of the principle. This suggests that the relevance of subsidiarity for the distribution of authority between the EU and the Member States may be overrated. However, a second development points in the opposite direction. This development may be qualified as the extension of the substantive scope of subsidiarity. A 'thin' conceptualization of subsidiarity entails that the subsidiarity calculus only includes the consideration of at what *level* of government a topic may be regulated. Such a thin concept makes it possible to separate subsidiarity from proportionality which concerns the *type* and *content* of measures to be adopted. Yet, in practice, as well as in doctrine,[57] a 'thicker' conceptualization of subsidiarity has emerged. This may include aspects of EU legislation such as: limiting the *scope* of EU legislative acts (e.g. limiting the EU dimension to cross-border situations and leaving purely internal issues for the Member States to regulate); *minimum harmonization* rather than total harmonization; regulating issues only in *general* terms or specifying *objectives* rather than imposing concrete norms.[58] This thick interpretation seems to be in line with the way national parliaments apply subsidiarity: as a means to enhance sensitivity for national diversity and approaches. The old Subsidiarity and Proportionality Protocol mirrored a similar sensitivity to Member States' policy discretion by requiring Union measures to leave as much scope for national decisions as possible, consistent with securing the aim of the measure and observing the requirements of the Treaty; to respect well established national arrangements and the organization and working of Member States' legal systems. Where appropriate and subject to the need for proper enforcement, Community measures should provide Member States with alternative ways to achieve the objectives of the measures.[59]

Thus, the 'spirit' of subsidiarity results in a thicker concept which has a greater impact on the distribution of authority between the EU and the Member States than the thin concept. This thick conceptualization is supported not only by scholars and EU as well as national legislative institutions. It constitutes the foundation of the system of economic governance as well.[60] Even though not explicitly, the subsidiarity principle is indeed reflected in the initiative that is left to the national

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57 CRAIG, *supra* at 4.

58 Compare Craig who distinguishes between limiting the scope of EU law and regulating at high levels of generality., CRAIG, *supra* at 4, p. 75.

59 Consideration 7 of the old Protocol on Subsidiarity and Proportionality, attached to the Treaty of Amsterdam.

60 As can be derived from: VAN DEN BRINK and VAN ROSSEM, Chapter 6 of this volume, Section 3.

level to set up national budget and reform plans and in the very concept of the 'coordination of national economic policies'. Subsidiarity is equally relevant in substantive terms here, as it is still primarily the Member States that define the content of macro-economic policies.

To conclude, sensitivity to subsidiarity issues has substantially increased. The subsidiarity principle thus increasingly defines the EU's constitutional system. Although designed as a principle to regulate the relation between the EU and the Member States, its impact thereon is, however, ambiguous and, at times, even indirect.

3.4. PROPORTIONALITY

The proportionality principle requires that a measure must be appropriate and necessary to achieve its objectives.[61] More concretely, the measure must be suitable to attain a legitimate aim; it must be verified whether there are other less restrictive means capable of achieving the same result and whether the measure does not have an excessive impact on the applicant's interests (proportionality *strictu sensu*).[62] Thus, the proportionality principle, unlike the principles of conferred powers and subsidiarity, primarily protects the individual freedom of citizens and business against over-intrusive public action. The origin of such public action may be European or national. Indeed, both European and Member States´ actions may be scrutinized as to their proportionality.

The first type of actions that may be scrutinized are Member States´ exceptions to the Internal Market freedoms. Such exceptions now also include the situation in which Member States decide to disapply Internal market freedoms in order to protect fundamental rights. The proportionality principle is applied here to assess whether such Member State actions are legitimate.[63] In this sense, the principle serves to increase EU authority over national public authority. But the extent to which this authority is actually stretched is ambiguous. Tridimas has observed that the CJEU applies different strategies in the context of the preliminary reference procedure: in some cases it has itself decided on the compatibility of national measures with proportionality; in others it has left this for the referring national court to decide. In the latter case, the CJEU may provide the national court with detailed guidelines or, instead, only with general guidelines, on how to apply the proportionality principle.[64] In the latter case, the authority of the Member States (in particular of Member

61 Article 5(4) TEU.

62 T. TRIDIMAS, *The General Principles of EU Law*, Oxford University Press, Oxford 2013, p. 139.

63 In legal writings, the application of the proportionality principle as the mechanism to settle conflicts between Internal market freedoms and fundamental rights has, however, been criticized, see e.g.: J. GERARDS, 'Pluralism, Deference and the Margin of Appreciation Doctrine' (2011) 80 *European Law Journal*, p. 112. As a mechanism to balance Internal market freedoms and other public interests, the proportionality principle has not been subject to such fundamental critique.

64 TRIDIMAS, *supra* at 63, p. 238.

States' courts) to decide on proportionality may in fact be quite substantial, but it is ultimately the CJEU that decides on the scope for national discretion here.

Conversely, proportionality curtails EU measures as well. Even though the principle primarily protects individuals, the CJEU has accepted as a matter of principle that Member States may challenge the legality of EU measures on the basis of proportionality arguments.[65] It will, however, not easily accept such complaints.[66] In general, the CJEU grants the EU legislature a wide measure of discretion, the limits thereof being 'whether the exercise of discretion has been vitiated by manifest error or misuse of powers or whether the institution concerned has manifestly exceeded the limits of its discretion'.[67] The case law is, however, not consistent and shows variation across areas. This has even been qualified as 'a celebration of judicial relativism'. Tridimas has distilled a number of factors to indicate in what situations the CJEU exerts stricter control over the EU legislature.[68] Some of these factors relate to the effect of EU measures on individuals (the greater the impact, the more insistent the CJEU will be in controlling compliance with proportionality). Other factors relate to the decision-making: if the adoption of a measure involves e.g. complex socio-economic decision-making, the CJEU will take a more cautious approach. In the latter case, proportionality affects the distribution of authority between the EU and the Member States only in an indirect way.

Even though the case law is not entirely consistent, it is clear that the level of control that the CJEU exerts on the EU legislature through the proportionality principle is relatively small. Thus, proportionality is primarily an issue of self-control for the EU legislature. In the Treaties, a distinction is made between content and the form of EU action.[69] With regard to the form of EU action, the old Subsidiarity and Proportionality Protocol contained the requirement that 'Community action shall be as simple as possible, consistent with satisfactory achievement of the objective of the measure and the need for effective enforcement'.[70] Also, directives should be preferred to regulations and framework directives to detailed measures. The Commission has further fleshed out the 'content part' of proportionality. In its Impact Assessment Guidelines it has prescribed that the effects of possible policy options must be identified, evaluated and compared.[71] This exploration should include the assessment of the effects of the 'no policy change' baseline scenario and the 'no EU action' (e.g. discontinuing existing EU action) scenario. If legislation already exists, the effects of improved implementation/enforcement thereof, the

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65 See e.g. case C-116/82, Commission of the European Communities v. Federal Republic of Germany, ECLI:EU:C:1986:322.

66 See the examples of cases elaborated by TRIDIMAS, *supra* at 63, p. 177.

67 Case C–84/94, United Kingdom/Council, ECLI:EU:C:1996:431.

68 TRIDIMAS, *supra* at 63, pp. 173-174.

69 Article 5(3) TEU.

70 Article 6 of protocol no. 30 attached to the Treaty of Amsterdam.

71 European Commission Impact Assessment Guidelines 2009, SEC(2009) 92, p. 29.

possible effects of self- and co-regulation and the effects of international standards where these exist should be considered before adopting new legislation.[72]

Proportionality affects the relation between the EU and the Member States even though its prime objective is the protection of individual freedom. As a judicial principle, its effects in terms of limiting the Member States in pursuing their own public interests are substantial; as a limiting factor for the EU legislature the judicial effects are however limited as well as ambiguous as the level of judicial scrutiny varies. The EU legislature itself has, however, developed legislative policies in which the proportionality principle is the leading principle to extort legislative restraint. The significance of the proportionality principle is, thus, twofold: it limits both EU and national action. As such, it is similar to the principles of conferral and subsidiarity which not only have the same double function, but also reveal a similar interplay between judicial and political-legislative application.

4. NATIONAL DISCRETION IN EU LAW

4.1. INTRODUCTION

Much EU legislation regulates issues only limitedly or partially. Member States' legislatures, their executive authorities or individuals, thus normally enjoy a certain measure of appreciation. Obviously, discretion in EU law directly affects the relation between the EU and its Member States. The concept lacks, however, a conclusive definition and is referred to under a wide variety of terms.[73] The phenomenon has been analyzed, primarily from the perspective of judicial protection and judicial control.[74] Questions in this regard include:

- the extent of judicial review of national action when Member States exceed the limits of their discretion;[75]
- whether the existence of national discretion creates an obstacle for establishing Member States' violation of EU law and constitutes a 'sufficiently serious breach' within the framework of Brasserie du Pêcheur liability;

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72 See on this last point: A.C.M. MEUWESE and L.A.J. SENDEN, 'European Impact Assessment and the Choice of Alternative Regulatory Instruments' in J. VERSCHUUREN (ed.), *The Impact of Legislation. A Critical Analysis of Ex Ante Evaluation*, Martinus Nijhoff/Brill Publishers, Leiden 2009, pp. 137-174.

73 M. BRAND, 'Discretion, Divergence and Unity' in S. PRECHAL and B. VAN ROERMUND (eds.), *The Coherence of EU Law*, Oxford University Press, Oxford 2008, p. 219.

74 An exception is T. VANDAMME, 'Democracy and Direct Effect. EU and National Perceptions of Discretion', in S. PRECHAL and B. VAN ROERMUND (eds.), *The Coherence of EU Law*, Oxford University Press, Oxford 2008, pp. 271-290. VANDAMME discusses national discretion in the context of the transposition of EU law. Here, the absence of discretion in various countries opens the possibility for diverging from the normal legislative procedures.

75 Case C-72/95, *Kraaijeveld*, ECLI:EU:C:1996:404.

- whether the existence of national discretion renders provisions of EU law insufficiently clear and precise and, thus, unsuitable to be directly enforced by individuals under the doctrine of direct effect;[76]
- whether national discretion may affect the legal certainty of individuals and, thereby, the legality of EU legislation.

These issues are in fact quite similar. Is EU law sufficiently concrete and precise for individuals to derive rights and obligations therefrom and, subsequently, may individuals enforce such rights in national courts? The general rule is that the less specific and the more open EU norms are, the less likely it is that they will result in rights for individuals and the possibility to enforce such rights. The position of the individual represents the main perspective here and, connected thereto, the relation between the national judiciary, on the one hand, and national legislative or executive authorities, on the other.

A second area in which discretion is a key concept concerns the powers of EU agencies. This goes back to the *Meroni* decision of the CJEU.[77] This decision concerns the conditions under which EU institutions may delegate regulatory authority to agencies. The delegation of power is only permitted for 'clearly defined executive powers' and 'broad discretionary powers' may thus not be delegated to agencies. Obviously, what is a 'clearly defined executive power' may be – and in practice is indeed – contested. In the recent *ESMA* decision, the CJEU considered that possessing decision-making powers was not equivalent to having discretion, as long as those decision-making powers are precisely delineated. Thus, the delegation of indeed quite far-reaching powers to ESMA was not illegitimate as the clear circumscribing of these powers made it impossible for ESMA to conduct autonomous policy. It is hotly debated whether the CJEU in this ruling merely applied the *Meroni* doctrine or rather extended it.[78] In any case, the doctrine is quite open-textured which makes the context in which an agency has been empowered an important factor for the decision whether delegation is legitimate or not.[79]

The notion of discretion in the context of judicial protection and judicial review relates to the position of the individual and in the context of the delegation of powers discretion relates to the EU institutional balance and accountability. Still, such analyses bear relevance for assessing the relation between national and EU

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76 The Francovich decision of the CJEU is a fine example of an analysis of discretion left to the Member States by Directive 80/987/EEC on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer, Joined cases C-6/90 and C-9/90, *Francovich*, ECLI:EU:C:1991:428.

77 Joined Cases C-9/56 and C-10/56, *Meroni*, ECLI:EU:C:1959:19.

78 See e.g. Scholten and Van Rijsbergen who speak about a 'new delegation doctrine': M. SCHOLTEN and M. VAN RIJSBERGEN, 'The Limits of Agencification in the European Union' (2014) 15:7 *German Law Journal*, pp. 1223-1256.

79 In the case of Meroni it concerned a delegation to a private organization which was, moreover, entrusted with balancing a complex set of imperatives. This may explain the strict approach of the CJEU. See: P. CRAIG, *Administrative Law*, Sweet & Maxwell, London 2012, p. 177.

levels of government. First, they teach us that discretion comes not only in different *degrees* but also in different *kinds*.

Partly drawing on the classification developed by Somsen[80] and Van Roermund[81], the following types of discretion may be distinguished: minimum harmonization, 'scope discretion', and enforcement discretion. To this may be added: 'elaboration discretion' and 'balancing discretion'. As we will see, the distinction between these categories is certainly not strict, and the different forms of discretion may overlap. Apart from minimum harmonization, which – as a concept of EU law – is grounded in the basic treaties, the classification is developed on the basis of the aforementioned literature as well as from the policy studies included in this volume.

4.2. MINIMUM HARMONIZATION

Minimum harmonization exists if EU law allows the Member States to adopt or to retain more stringent measures. This suggests clear-cut implications for the division of authority between the EU and the Member States. But the freedom for Member States is a limited one. This freedom is limited by norms from the broader context of EU law, most notably from the Internal market. An explanatory example is the decision of the CJEU in the case of *Dusseldorp*.[82] The case concerned a national environmental measure that went further than the EU Regulation on which it was based. Although such a stricter national approach was in line with EU environmental policy (being an area of minimum harmonization – Article 193 TFEU), the CJEU considered the national measure to be unacceptable. It resulted in an advantage for a Dutch firm and it pursued as such not only environmental objectives. Thus, national discretion in the case of minimum harmonization is limited by the objectives of the EU policy or legislation on which the national measures build.[83] These objectives are ultimately defined and interpreted at the EU level. Moreover, even if stricter national measures pursue the applicable EU objectives, such measures are subject to a proportionality test if they affect other norms of EU law, most notably Internal market provisions.

The relation between minimum harmonization and the general requirements of EU law regularly gives rise to problems. These problems may result from the

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80 H. SOMSEN, 'Discretion in European Community Environmental Law: An Analysis of ECJ Case Law' (2003) 40:6 *Common Market Law Review*, pp. 1413-1453.

81 B. VAN ROERMUND, 'Law at Cross-Purposes: Conceptual Confusion and Political Divergence' in S. PRECHAL and B. VAN ROERMUND (eds.), *The Coherence of EU Law*, Oxford University Press, Oxford 2008, pp. 315-341.

82 Case C-203/96, *Chemische Afvalstoffen Dusseldorp*, ECLI:EU:C:1998:316.

83 An interesting example of the latter case is provided by the decision of the CJEU in Case C-169/89, *Gourmetterie van den Burg*, ECLI:EU:C:1990:227 in which the court decided that a Dutch ban on importing and marketing red grouse was incompatible with EU law. Even though the Wild Birds directive included the possibility for the Member States to adopt or retain in force stricter standards, the Netherlands could not apply this exception to birds which were neither part of a migratory nor an endangered species.

lack of a clear definition of minimum harmonization or of the lack of an explicit qualification of legal acts as such. Also uncertainty on what qualifies as 'stricter norms' under minimum harmonization may arise.[84] Dougan has argued that minimum harmonization is in particular problematic if the legal act in question does not include a provision on its relation to free movement provisions.[85] On the basis of the cases of *Buet* and *AherWaggon*, Dougan argues that:

> '(…) the relationship between a minimum harmonization clause and the demands of the internal market cannot be answered on the basis of an abstract assessment of the specific measure at issue. Instead, one must conduct a *contextual analysis* (emphasis added) to determine whether the relative emphasis of Community policy falls on free movement and regulatory uniformity, or on social protection and differentiation.'

Even though minimum harmonization is a well-established element in EU law, its effects on the relation between the Member States and the EU may indeed be quite ambiguous. This may lead to legal uncertainty on the part of the Member States which may, ultimately, only be removed by the CJEU.

4.3. 'SCOPE DISCRETION'

The material and personal scope of application is a general issue with regard to legal provisions. This applies to EU law as well. Frequently, the scope of application of EU law is left, at least in part, for the Member States to determine. This freedom comes about in different ways. The EU legislature may explicitly leave Member States with the freedom to apply EU regulations and directives beyond a 'core' that is defined by the EU legislature itself, or it may explicitly refer to national legislation.[86] Implicit discretion for Member States to decide on the scope of application exists when they can decide on the interpretation of key concepts in EU legislation. Somsen has elaborated on the concepts of 'waste' and 'information

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84 Y. HOFHUIS, *Minimumharmonisatie in het Europese recht*, Kluwer, Deventer 2006, p. 23.

85 M. DOUGAN, 'Minimum Harmonization and the Internal Market' (2000) 37:4 *Common Market Law Review*, p. 868.

86 An example is Article 2(2) Directive 2004/38 of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L158/77, which enables the Member States to extend the rights of family members to partners in a registered partnership if they treat registered partnerships as equivalent to marriage. Another example of an extension of the scope of application is the decision of the French authorities to extend the right of granting a residence permit to those who denounce their traffickers to Bulgarian and Romanian nationals, whereas Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities, which limits this right to third country nationals, see the contribution by MARGUERY and OUDE BREUIL in this volume, Chapter 9.

relating to the environment' in the field of EU environmental law.[87] The regulatory frameworks in this field are based entirely on these concepts. This means that the definition of these concepts determines in what situations EU legislation is to be applied. Thus, if EU legislation is based on key concepts without defining them, the Member States enjoy substantial freedom to decide on the scope of application of EU legislation.

But even if EU legislation defines key concepts, the Member States may still possess the power to influence the scope of application, e.g. by further elaborating such definitions, or – as Somsen has observed – by the qualification and classification of factual situations in light of these definitions. A good example can be derived from the Natura 2000 regime. The designation of protected areas defines the territorial scope of application of a number of environmental and nature protection measures. As Princen observed[88] the identification of national areas of protection is for a large part determined by the individual Member States, which, thus, have a substantial influence on the territorial application of the EU protection measures.

Lastly, scope discretion may exist when Member States have the possibility to apply exceptions. Article 5 of the Copyright Directive[89] contains an list of exceptions that Member States may implement to restrict copyright protection (such as home use, educational use etc.). This list is exhaustive, but Member States have a 'broad discretion', as the CJEU puts it, in interpreting these exceptions.[90]

Scope discretion may be problematic, however. In the case of the Copyright Directive, it has been observed that 'significant divergences exist with regard to the scope of the exceptions and limitations, which create legal uncertainty for both consumers and creators.'[91] The CEPS Digital Forum report therefore recommends 'careful reflection' on the way these exceptions are dealt with by national courts and urges the consideration of a more harmonized and technologically more flexible framework.[92]

Consequently, the legislative act from which scope discretion follows usually contains limits to the freedom of the Member States. But also the principle of the full effectiveness of EU law creates limitations to scope discretion. The CJEU critically assesses whether Member States' restrictive definitions of the scope of application are in line with the '*effet utile*' of EU law. Exempting specific situations from the scope of application of EU legislation may for the same reason amount to a breach of EU law. This may make this type of discretion difficult to handle for

87 SOMSEN, *supra* at 81, p. 1436.

88 S.B.M. PRINCEN, *Het Moet van Brussel: de verhouding EU en lidstaten tussen retoriek en werkelijkheid*, inaugural lecture Utrecht University, 3 October 2014.

89 Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10.

90 Case C-145/10, *Painer*, ECLI:EU:C:2011:798.

91 See also: <www.beuc.org/publications/2012-00797-01-e.pdf>.

92 See also: <www.boek9.nl/files/2013B9/Boek9_-_Giuseppe_Mazziotti_-_Copyright_in_the_EU_Digital_Single_Market.pdf>.

Member States, as the freedom of the Member States to interpret such terms is often very unclear.[93]

4.4. ENFORCEMENT DISCRETION

Enforcement discretion refers to the situation in which the substantive norms are set at the EU level, but the Member States retain the freedom to decide on the appropriate modes and procedures of enforcement. This type of discretion is distinct from other types in that the principles of national institutional or procedural autonomy are key to determining its existence and its scope. As a consequence of these principles, it is in principle a matter for the Member States to decide whether they will apply a system of administrative, criminal or private enforcement. These principles do not, however, result in total freedom for the Member State to decide on appropriate enforcement. The 'European enforcement deficit,[94] manifested in areas such as environmental law and EU fraud, has led European institutions to shift its focus from the 'production' of substantive rules and regulations to compliance with EU law.

It has been mainly the European Court of Justice that has developed a general framework for the enforcement of EU law. It has determined that the enforcement of EU law should be effective, dissuasive, proportional and equivalent to the enforcement of comparable national rules and regulations.[95] But the CJEU has also limited enforcement by requiring that fundamental rights, treaty freedoms and general principles of EU law should be respected.

This case law-based framework applies to the enforcement of EU law *in general*. In specific sectors, however, the EU has adopted legislative measures to regulate national enforcement. Thus, national enforcement discretion may be significantly diminished. Exceptionally, enforcement itself may even be Europeanized, as has recently been accomplished in the field of banking supervision.[96] Other measures may be much less intrusive and are merely aimed at facilitating cooperation between national enforcement authorities and between national enforcement authorities and the European Commission.[97] But EU law may indeed prescribe a

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93 SOMSEN, *supra* at 81, elaborates on joined cases C- 418/97 and 419/97, *ARCO Chemie Nederland*, ECLI:EU:C:2000:318, on the concept of 'waste' where the CJEU applied a wide interpretation on the basis of a teleological interpretation. A teleological interpretation, however, may affect foreseeability, making it difficult for Member States to predict whether the CJEU will allow a specific interpretation of a concept relating to the scope of application.

94 P.C. ADRIAANSE, T. BARKHUYSEN, P. BOSWIJK, K. HABIB, C. DE KRUIF, M.J.J.P. LUCHTMAN, W. DEN OUDEN, S. PRECHAL, B. STEUNENBERG, J.A.E. VERVAELE, S. DE VRIES, W.J.M. VOERMANS and R.J.G.M. WIDDERSHOVEN, 'Implementation of EU Enforcement Provisions:Between European Control and National Practice' (2008) 1:2 *Review of European Administrative Law* 2008, pp. 83-97.

95 Case 68/88, *Greek Maize*, ECLI:EU:C:1989:339.

96 See the contribution by VAN BOCKEL and DUIJKERSLOOT in this volume, Section 3.4.5.

97 A case in point is Council Regulation 1/2003/EC of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1.

specific system of enforcement,[98] or even contain detailed provisions on the powers of enforcement authorities.[99] However, the developments are not necessarily geared towards increased Europeanization: national authorities have acquired a greater role in enforcing EU competition law since the entry into force of Regulation 1/2003/EU than they had before.[100]

4.5. 'BALANCING DISCRETION'

Balancing discretion refers to the possibility of the Member States to choose from a range of policy options based on how they wish to balance competing core values or public interests. As opposed to the technical and detailed elaboration of norms, balancing discretion involves political decision-making. Consequently, balancing discretion places particular demands on democratic legitimacy. An important example exists in the context of EU primary law, where the Member States may balance national public interests and Internal Market imperatives as part of a proportionality test. But also in EU secondary legislation balancing discretion may be found, even though most EU legislation itself already involves a balancing of competing public interests.

The proposal for women on corporate boards includes the discretion for Member States to balance the freedom to conduct a business and gender equality. Even though in the proposal itself these values are already balanced in some way,[101] the freedom for the Member States to eventually shape the implementing legislation is so substantial that it will require in fact a separate decision on how to actually balance gender equality against other values. This is particularly so since the proposed directive not only leaves the Member States the freedom to decide on the measures to achieve the identified objectives, but it is also ambiguous in terms of the 'hardness' of these objectives themselves. Especially the decision of how vigorous the Member States will enforce the gender balance on corporate boards entails in essence the 'rebalancing' of the key values at stake here.

Another example is found in the area of electronic communications law, in which the Member States retain a substantial degree of discretion to decide under what conditions broadcasting frequencies are allocated to market parties.[102] They may favour competition in the market and, thus, apply the lowest price criterion

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98 Such as Directive 2004/48/EC of 29 April 2004 on the Criminal Enforcement of Intellectual Property Rights [2004] OJ L195/16.

99 JANS *et al*. elaborate on Regulation 2729/2000/EC on the powers that control officials in the wine sector should be entrusted with: J.H. JANS, R. DE LANGE, S. PRECHAL, R.J.G.M. WIDDERSHOVEN, *Europeanization of Public Law*, Europa Law Publishing, Groningen 2007, p. 222.

100 See the contribution by VAN BOCKEL and DUIJKERSLOOT in this volume, Section 3.2, although the authors view the regulation and the subsequent practices based thereon as an example of 'controlled agency' rather than as genuine decentralization.

101 See the contribution by BUIJZE, DE KONING and SENDEN in this volume, Section 2.3.

102 *Ibid*., Section 3.1.

but they may also include additional demands on service providers to protect other interests such as those of consumers. Similarly, Member States may include social policy objectives in public procurement to ensure not only the best services at the lowest prices but e.g. also that specific employment policy objectives are being met. In the *Beentjes* case the CJEU ruled that such social conditions could be included in national procurement procedures, even though the Procurement directives at the time did not explicitly allow the Member States to do so.[103] The current Public procurement directives now explicitly recognize this. Therefore, even this type of far-reaching discretion for Member States is not necessarily in retreat but may indeed effectively be strengthened. Lastly, the case of prostitute migrants is an example of how balancing discretion for Member States (in this particular case between security and justice) may lead to adverse effects for individuals, without EU law effectively preventing this.[104]

The existence of balancing discretion in EU law is a key element to evaluate national authority. In this light, it is an important observation that even though the EU may have regulated a certain issue, Member States may still have the power to decide on how they wish to balance core values. Moreover, it cannot be said that the trend in EU legislation is towards a limitation of balancing discretion. The examples of EU public procurement and competition law indicate that the Member States' freedom to balance core values might even increase and allows them to take newer interests into account such as sustainability.

4.6. ELABORATION DISCRETION

Elaboration discretion refers to the further fleshing out of EU legislation in more detailed national norms. It may result from the compromise nature of EU legislation or from the desire to shape more concrete norms in accordance with local expertise and peculiarities. This type of discretion involves, for instance, the further elaboration of open-textured norms into norms which may be applied and invoked by individuals. It may also refer to the freedom of Member States to decide on appropriate measures to achieve concrete and specific policy objectives set by the EU. This is especially (although certainly not only) the case with regard to directives. Although the CJEU has argued that the freedom to decide on the appropriate form and methods is restricted by the result that a directive seeks to achieve (and may thus be non-existent),[105] the legislative practice reveals that many directives indeed leave considerable freedom to the Member States.

A very concrete example is the Universal Service Directive in the field of electronic communications. This directive leaves the Member States with the

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103 Case 31/87, *Beentjes*, ECLI:EU:C:1988:422.

104 See the contribution by MARGUERY and OUDE BREUIL in this volume, Section 4.

105 Case 38/77, *Enka*, ECLI:EU:C:1977:190.

freedom to decide how to address market failures. They may, for instance, provide public payphones, designate universal service providers or opt for price regulation.[106] This example may actually be seen as an example of both types of elaboration discretion: not only the concrete measures are to be chosen at the national level, but the objectives themselves need further specification as well. The Member States enjoy, within the margins set by the directive, considerable freedom to determine what exactly qualifies as a market failure. Budgetary discipline, as imposed in the framework of the repressive arm of economic governance, equally entails elaboration discretion.

Unlike balancing discretion (see above), elaboration discretion entails no balancing of fundamental public interests. Admittedly, the concretization of norms inevitably entails that various policy options are evaluated. This may indeed, to some extent, involve an assessment of underlying core values. Nevertheless, the main issue is the further concretization of EU legislation into norms which create clarity on the legal position of individuals and other actors involved. As such, the principle of *effet utile* is relevant here – as the creation of concrete norms is necessary to ensure the full effect of EU law – as well as the principle of legal certainty.[107]

Elaboration discretion is perhaps the most common form of national discretion. From the areas analyzed in other chapters of this volume, elaboration discretion exists in:

- the proposal for the Directive on Women on Corporate Boards (most notably with regard to the choice of the appropriate measures to achieve the objectives of the directive);[108]
- the case of migrant prostitutes (most notably the interpretation of national security objectives);
- apart from the Universal Service Directive in electronic communications law, also the Access Directive contains elements of national discretion (such as the choice of measures to be imposed on dominant market players in order to ensure that other players may enter the market);
- in public procurement law, Directive 2004/18/EU contains a broader definition of award criteria (compared to its predecessors), allowing the Member States to further flesh out these criteria;
- a particular form of elaboration discretion may be found in the area of EU economic governance. The so-called repressive arm of economic policy coordination contains concrete and specific objectives to achieve a situation of sound public finances. The Member States enjoy freedom in how they choose

106 See the contribution by BUIJZE, DE KONING and SENDEN, *supra* at 13, Section 3.1.
107 *Cf.* A. PRECHAL, *Directives in EU Law*, Oxford University Press, Oxford 2005, para. 5.2.1.
108 See the contribution by BUIJZE, DE KONING and SENDEN, *supra* at 13, Section 3.1.

to achieve these objectives. This freedom is, however, increasingly limited by the EU's growing involvement in the definition of national economic policies.[109]

4.7. CONCLUSION

The focus on national discretion in EU law adds a new layer to the analysis of the division of authority between the EU and the Member States. National discretion flows, at least in part, from the application of EU institutional principles (most notably subsidiarity and proportionality) but its effects may only be fully understood from the analysis of concrete EU legislation. National discretion, as the principles of subsidiarity and proportionality may indeed suggest, is not just a matter of degree or even a binary choice. In fact, a number of distinct types of national discretion may be identified. The legal and political context is different for each of them. Contrary to other forms of national discretion, balancing discretion leaves, for instance, substantial political decision making power to the Member States. By contrast, enforcement discretion relates to national systems and procedures for the enforcement of EU legislation and does not affect substantive norm-setting. Thus, identifying the type of national discretion contained in EU legislation clarifies what type of decision-making is left to the national level and, consequently, what the implications are for the relation between the EU and the Member States. However, the different types of national discretion have in common that their limitations and even their very existence is determined by EU law. EU legislation itself or the broader framework of general EU principles such as the principles of *effet utile* and legal certainty define national discretion.

The focus on national discretion confirms the idea of authority being shared between national and EU levels of government. The various types of national discretion included in EU legislation constitute just as many dimensions of authority, all of which may result in a different degree of Europeanization. A high degree of national enforcement discretion may, for example, be combined with a low degree of national balancing discretion within the same legislative act. This results in an intricate system of shared authority. This system is, furthermore, not static. Changes in EU legislation may lead to a diminishing of national discretion (e.g. in the field of financial regulation), but also in an increase thereof. This adds to the complexity of the system of shared authority.

5. FINAL CONCLUSION

The division of authority in the EU/national legal order is determined by the combination of substantive and institutional core values. At the legislative level,

[109] See the contribution by VAN DEN BRINK and VAN ROSSEM, *supra* at 61, Section 3.

this division is not only reflected by the intensity and quantity of EU legislation, but also by the existence of national discretion. This has resulted in an ever more intricate and refined system of legal principles, legislative and judicial practices and arrangements that shape the division of authority between the European Union and the Member States. Craig has argued that the desire to create *clarity* in the system of treaty competences and the political wish to *contain* the EU by placing substantive limits on its powers have been the main forces behind the treaty reforms on competences. Clarity and containment may equally be seen as the driving forces behind the other changes to the legal system. Sensitivity to the division of authority between the EU and the Member States is reflected from the highest level of Treaty competences to the level of concrete EU legislation.

Paradoxically, the level of complexity has increased rather than diminished. There are several reasons for this. First, the impact of the various institutional principles is far from straightforward. The principle of subsidiarity, for instance, is by its nature limited to the achievement of EU objectives, but in the legislative practice these are balanced (at least by national parliaments) with national interests. Moreover, the interpretation of such principles differs between actors (again, the subsidiarity principle is a good example here).

The second element that determines the high level of complexity is the interplay between substantive and procedural aspects. The division of authority between the EU and the Member States is not only determined by the substantive application of institutional principles, but also by the procedural context within which they apply. The fact that the principle of conferral is mainly decided upon by the EU legislature (with a very small role for the CJEU) and that national parliaments monitor subsidiarity compliance is decisive for the question of how these principles affect the division of authority.

Thirdly, the division of authority is to a great extent determined by substantive, rather than institutional core values. Such substantive core values may be of 'Treaty status' themselves, such as the protection of fundamental rights and the good functioning of the Internal market and its fundamental freedoms. Others may be derived from Treaty provisions, such as the core value of social protection which may be derived from the Treaty objective to create a social market economy. Others are substantive values underlying specific legislation such as the objective of financial stability in financial regulation.[110]

Some of the major changes in EU legislation must primarily be explained from a different weighing and balancing of substantive core values. A topical and profound example is the paradigm shift that has taken place in the Europeanization of financial regulation in last few years. Institutional principles have played only a marginal role here and may certainly not explain this shift.

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110 See further on the classification of core values, the contribution by GERBRANDY and SCHOLTEN in this volume, Chapter 2.

In other areas, substantive core values have affected the division of powers between the EU and the Member States indirectly, i.e. through institutional principles and core values. In the case of the Gender equality proposal, the conflict of substantive core values has shaped both the legal basis and subsidiarity issues. Similarly, such a conflict may result in a considerable degree of national discretion, thereby leaving it partly to the Member States to balance substantive core values. Conversely, consensus on the interpretation of substantive core values – and on the way of balancing them – makes the legal basis and subsidiarity relatively easy issues to address. The consequence of this may be a relatively high level of intensity of EU regulation (as the example of air passengers' rights indicates).

These examples highlight the importance of national discretion for determining the division of authority in the European Union. Although national discretion in EU legislation may be linked to the principles of subsidiarity and proportionality, its relevance to the division of authority in the European Union justifies separate attention. The typology of national discretion has demonstrated that the relation between the EU and the Member States is multi-dimensional. The division of legislative authority may, indeed, differ depending on the type of national discretion at hand. Moreover, even the broader decision-making context may be different (as is the case with regard to the principle of institutional and procedural autonomy which comes into play in the case of enforcement discretion).

Thus, zooming in on the typology of national discretion in EU law further clarifies the relation between the EU and the Member States. The way in which national discretion affects authority is multifaceted. Discretion in EU law is often implicit, making the scope thereof or even its very existence contestable. This may be explained by the fact that – unlike the principles of conferral, subsidiarity and proportionality – characterizing and identifying types of national discretion forms no explicit part of legislative procedures (the only exception arguably being minimum harmonization). This is, moreover, not compensated by other actors involved in EU legislation, such as national parliaments. Apart from subsidiarity, they mostly focus on the political desirability of draft EU legislation rather than on the scope for national decision-making. Thus, considerable potential exists to increase clarity on the relation between the EU and the Member States by including the decision on the type and the degree of national discretion as an explicit and structural aspect of the EU legislative process.

Authority in the EU legal order has been studied primarily from the perspective of the legislative and judicial practice in this chapter. The relation between the EU and the Member States has equally been an issue that has received much scholarly attention in EU constitutionalism doctrine. This is not the place for an in-depth analysis of the relevance of this study in light of the various constitutional theories on EU integration, but some exploratory observations may indeed be made here.

First of all, the prevailing approach of authors in the field of European constitutionalism has been to seek to determine the source of 'ultimate' authority

in the European legal order. This approach has resulted in the following issues being addressed and debated: the transformation of the European legal order from an international into a constitutional legal order[111]; the question whether the result is a hierarchical legal order or, rather, a heterarchical order; and if the result is indeed a hierarchical system, whether this entails that the Member States are still the 'masters' of the legal order or, as opposed to this, the EU is.[112] The findings of this study do not relate to this issue of ultimate authority and, thus, do not serve to support a specific school of thought.

However, a different strand of research focuses more directly on the relation between the EU and the Member States. A key issue is whether it is possible at all to distinguish between Member States' and EU powers in a meaningful way. Various scholars have indeed identified the EU and national legal orders as one integrated legal order in which Member States´ and EU authority is diffused. Although the discussion on whether the European Union may be qualified as a federation of one type or other is a highly sensitive one ('the 'F' word), theories on federalism may be – and indeed are – used to draw inspiration in order to better understand the relation between the EU and its Member States. Schütze has contrasted systems in which levels of government are distinct (*dual* federalism) with systems in which authority is shared between levels of government (*cooperative* federalism).[113] Dual federalism refers to the model in which powers are clearly delineated thus creating mutually exclusive spheres of competences. Cooperative federalism contends that both levels of government may legislate in the same policy area and that more functional approaches to the actual distribution of responsibility are taken. Schütze's argument is that the EU is moving away from dual federalism to a constitutional situation that qualifies as cooperative federalism.

The results of this study in the light of Schütze's hypothesis are ambiguous. A clearer delineation of EU powers and subjecting the way they are exercised to stricter conditions has been an increasingly important issue, especially since the Laeken declaration of 2001. It has certainly had its effects on the EU legal framework and also on the functioning thereof. This would indicate that the dual model fits the EU better. But other developments point in the exact other direction. The division of authority in the field of economic policy coordination, which may be qualified as a legally entrenched dialogue, is extremely difficult to entangle. Furthermore, the phenomenon of national discretion in EU legislation fits well in a cooperative model. The various forms of national discretion in EU legislation and the ways in which Member States remain constrained by EU law conditions in exercising such discretion, underline this point. Another example is the codification effort in the area of sales law, which is aimed at creating a European sales law that would co-

111 J. WEILER, 'The Transformation of Europe' (1991) 100 *Yale Law Journal*, p. 2403.

112 The idea of a heterarchical legal order in which overlapping and even conflicting claims to authority exist has developed into a school of thought now known as 'constitutional pluralism'.

113 R. SCHÜTZE, *From Dual to Cooperative Federalism*, Oxford University Press, Oxford 2009.

exist with national law (and leaving the choice of the applicable regime to private parties).

The concept of sovereignty presupposes the unity of authority, territory and citizens. The main argument of this chapter has been that the element of authority itself is shared but also diffused in the European Union. Moreover, even the direction of the developments is ambiguous. In any case, a general Europeanization or a transfer of authority to the European level may not be ascertained. Despite the pressure to bring greater clarity in the delineation of authority between the European Union and the Member States, instead more complexity is added. How this affects the other elements of sovereignty will be further elaborated in the concluding chapter of this volume.